No. 82-1988

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender
of Douglas County, Oregon, and
GARY BABCOCK, Public Defender
of the State of Oregon,
Petitioners,

v.

BILLY IRL GLOVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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AMICUS BRIEF

of the

NATIONAL ASSOCIATION OF

CRIMINAL DEFENSE LAWYERS

and the

OREGON CRIMINAL DEFENSE

LAWYERS ASSOCIATION

INTRODUCTION

The National Association of Criminal Defense Lawyers (NACDL) and the Oregon Criminal Defense Lawyers Association (OCDLA) submit this brief in support of the holding of the Ninth Circuit Court of Appeals in this matter that respondent has stated a cause of action under 42 U.S.C. § 1983 because public defenders charged with conspiring with state officials in violation of that

statute are not immune from suit. The written consent of the parties to this action to file this brief is on file with the Clerk of the Court.

The NACDL is a District of Columbia non-profit corporation with a membership comprised of more than three thousand lawyers, including representatives of every state. NACDL was founded twenty-five years ago to promote study and research in the field of Criminal Defense Law, to disseminate and advance the knowledge of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of the defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the

protection of individual rights, and the improvement of criminal law, its practices and procedures.

The OCDLA is comprised of nearly 400 criminal defense lawyers, both private and public, and is organized for the purpose of advocating the competent defense of citizens accused of crime and advocating the rights and liberties guaranteed by both the Oregon Constitution and the United States Constitution. To that end, OCDLA has conducted seminars and published legal literature to help improve the quality of criminal defense in Oregon.

Both the NACDL and the OCDLA, which recognize that such a position will expose their members to potential civil liability, join respondent in seeking the affirmance of the

decision of the Ninth Circuit Court of Appeals in holding that petitioners, public defenders alleged to have acted under color of state law, are not immune from a civil rights action under 42 U.S.C. § 1983. NACDL and OCDLA have a keen interest in advancing the professionalism of public defenders and court-appointed private counsel, and both associations believe that this Court will be aided by the positions of the only national group and the only Oregon organization which speak solely on behalf of criminal defense attorneys.

Both associations also have an interest in protecting the rights of all of the accused and in insuring that no one is denied these rights on the basis of their indigency, and submit this brief in support of the

indigent accused's equal access to civil courts.

ARGUMENT

Title 42 U.S.C. § 1983 provides that "[e]very person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. Although the statute seemingly creates a species of tort liability that on its face does not immunize anyone from its prohibitions, this Court, in a number of successive cases, has determined that § 1983 is to be read in harmony with general principles of tort immunities and defenses and not in derogation of them. Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Thus, this Court has con-

ferred absolute immunity from suit brought under § 1983 upon judges, Pierson v. Ray, 386 U.S. 547, 554-55, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), and upon prosecutors "in initiating a prosecution and in presenting the State's case", Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Court conferred these immunities, however, based upon the immunity historically accorded the relevant official at common law and the compelling public interests behind it.

The decision to confer absolute immunity upon judges and prosecutors has been partly based upon the belief that if these officials were not granted immunity the exercise of their governmental functions would be severely impeded. The immunity of

judges from liablity for damages within their judicial jurisdiction

> "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Pierson v. Ray, supra, 386 U.S. at 553-54.

This Court also found that denying a prosecutor absolute immunity from civil liability under § 1983 "would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." Imbler v. Pachtman, supra, 424 U.S. at 427-28. There is no such public interest to be served, however, when deciding

upon whether to confer immunity from suit under § 1983 upon criminal defense counsel, whether the attorney is a public defender, court-appointed or privately retained.

Although petitioners expend a great deal of effort attempting to equate the role of the public defender with that of the judge and prosecutor, it is clear that public defenders are not different from other counsel representing their individual clients. In discussing whether an appointed counsel representing a defendant in a federal criminal trial should be entitled to immunity as a "federal officer", this Court noted that

> "[t]here is ... a marked difference between the nature of counsel's responsibilities and those of other officers

of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. *** The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would confict with their resolve to perform their designated functions in a principled fashion.

"In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. *** His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. *** If anything, it provides

> the same incentive for appointed and retained counsel to perform that function competently."
>
> Ferri v. Ackerman, 444 U.S. 193, 202-04, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) (footnotes omitted; emphasis added).

In Ferri, supra, which held that court-appointed counsel is not immune from a malpractice action by his former client, the Court also found that

> "[h]aving concluded that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge, or naval captain, we also conclude that the federal officer immunity doctrine explicated in cases like *** Butz v. Economou, 438 U.S. 478, 47 L.Ed.2d 895, 98 S.Ct. 2894, is simply inapplicable in this case." Id. at 205 (emphasis added).

In addition, the arguments advanced by petitioners for drawing distinctions between public defenders and retained counsel on the question of immunity in reality reflect at best an acceptance of inferior (and therefore unconstitutional) representation for the indigent accused and at worst encouragement of defective assistance of counsel. The litany of horrors paraded before the Court by petitioners - understaffed and underfunded public defender offices already unable to handle the increasing caseload without having to defend against § 1983 litigation - presupposes that the majority of the clients of public defender officer will not receive competent assistance of counsel. Such a rationale for conferring immunity is surely not the

intent of that doctrine and would not serve the public interest. The petitioners' plea that "[f]unding for indigent defense is approaching crisis" is commendable, but a plaint to be made before the legislature rather than this Court.

The inability of public defenders to exercise their professional discretion if exposed to civil liability is equally specious. This "chilling effect" - that public defenders would have difficulty resisting the pressure by their clients to present meritless claims without immunity - is simply nonsense. Along with his or her privately-employed colleagues, the public defender has professional integrity and adheres to the same Canon of

Ethics.[1] To contend that public defenders will be unable to act responsibly towards the court simply due to fear of being sued by the client, although privately-retained counsel apparently will not be so affected, is patently frivolous.

Petitioners also claim that lack of immunity from suits under § 1983 will make it difficult for public defenders to assign priorities among their clients due to limited

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[1] ABA Code of Professional Responsibility states:

> "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B).

time and resources. Of course, this argument ignores the fact that all attorneys must allocate their finite time and resources among their clients, but again, this is not an adequate justification for protection from a § 1983 lawsuit.

Petitioners imply that public defenders are so overburdened with work that they cannot adequately represent some clients without sacrificing the interests of others. While this dilemma may be true in some instances, and for privately-retained counsel as well, to advance it as support for denying compensatory relief to victims of corrupt officials is alarming to anyone concerned with the quality of representation given to an indigent accused. Restricting the remedies

for those individuals injured by overworked and inadequately supported public defender offices is hardly an acceptable response to the problem. As previously noted, the only acceptable response to this problem is for legislatures to insure that public defenders and appointed counsel be given the resources necessary to provide effective assistance of counsel to the indigent accused.

Indeed, petitioners do not include private counsel who is appointed by the court to represent the indigent accused in their arguments for immunity. Yet these attorneys are equally likely to be exposed to a § 1983 action similar to respondent's. Most private attorneys accept court-appointments as a public

service rather than for private gain, as the compensation is rarely adequate.[2/] Unlike most public defender offices, they do not have private investigators or paralegals on their staffs to assist them in adequately representing their clients. They too must allocate their limited time and resources, and would have to expend some of their energy in defending what petitioners have termed "this frivolous litigation." Petitioners' arguments apply equally to private attorneys because, as this Court has noted,

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[2/] The Oregon trial courts are statutorily mandated to compensate attorneys appointed by the court at the rate of $30.00 per hour. ORS 135.055.

> "[e]xcept for the source of payment, [the] relationship [between public defender and client] became identical to that existing between any other lawyer and client. 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.' American Bar Association Standards for Criminal Justice, 4-3.9 (2d ed. 1980)." Polk County v. Dodson, 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (footnote omitted).

Perhaps the most appalling argument purported by petitioners, however, is that competent attorneys will not become public defenders or remain in that field due to the potential exposure to § 1983 litigation. This contention unfairly impugns the dedication and abilities of those lawyers who, in obedience to

the standards of our profession and indeed to the commands of our Constitution, elect to defend the indigent accused. In addition, this argument again implicitly accepts as fact the existence of unconstitutional inadequacies in our criminal justice system in providing representation to the poor. If there truly is a problem with attracting and retaining competent attorneys in public defender offices, then the rational solution is to provide better salaries and better working conditions.

Petitioners also note that clients often perceive their public defenders as another arm of the state, not acting on their behalves but in cooperation with the prosecutor. If public defenders are granted immunity in cases such as respon-

dent's, the public defender even more closely resembles the state and the prosecution. Immunity would therefore erode even further the trust and confidence an indigent client has in his public defender, elements which everyone in our profession recognizes as an important factor in providing adequate representation to a client.

CONCLUSION

For the reasons set forth herein, NACDL and OCDLA respectfully join the respondent in urging this Court to affirm the mandate of the Ninth Circuit Court of Appeals and remand the matter to the district court for further proceedings.

Respectfully submitted,

/s/ John S. Ransom

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/s/ Diane L. Alessi

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